United Nations A/C.6/55/SR.20

General Assembly
Fifty-fifth session

Official Records

Distr.: General
14 November 2000

Original: English

Sixth Committee

Summary record of the 20th meeting
Held at Headquarters, New York, on Tuesday, 31 October 2000, at 10 a.m.

Chairman: Mr. Politi ..... (Italy)

Contents

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

00-71889 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Becker** (Israel) said he strongly endorsed the position that States had full discretion in the exercise of diplomatic protection, which involved the evaluation of delicate matters relating to foreign policy and national interests. In general, he considered that a State could take up the claim of a bona fide national against a third State without having to show an effective link with that national; in that connection, he noted that the *Nottebohm* case did not address the general issue of the relationship between nationals and States. However, it might be necessary to set limits in order to prevent abuse in, inter alia, cases where nationality had been acquired in bad faith.

2. With respect to dual or multiple nationality, he endorsed the principle expressed in draft article 7 but agreed that the issue of coordination in the exercise of diplomatic protection between two or more States should be addressed in greater detail.

3. In principle, he supported the approach embodied in draft article 8. Nevertheless, additional restrictions might be needed since stateless persons and refugees were subject to different legal regimes involving specific obligations for States.

4. Turning to the draft articles on unilateral acts of States, he reiterated his view that an attempt to provide a strict legal definition of such acts would run counter to actual State practice. However, he recognized that there was general support for continued consideration of the topic. He therefore welcomed the proposal to study the various categories of unilateral acts and agreed that the initial focus should be on acts that created legal obligations for the author State. He also endorsed the principle that the acts in question were those whose legal effects were not predetermined by the law of treaties or customary law.

5. He welcomed the replacement of "declaration" with "act" and "obligations" with "legal effects" in draft article 1; he considered that unilateral acts entailed not only legal obligations but also the acquisition or maintenance of rights. However, he regretted the replacement of the phrase "publicly" by "and which is known to that State or international organization" which could suggest that a unilateral act would have legal effects even if its existence became known to the addressee State by indirect means. He therefore supported the proposal to add the words "which is made known by the author State" to the definition. Furthermore, he considered that the requirement that unilateral acts must conform to international law and, in particular, peremptory norms should be explicitly incorporated into draft article 1.

6. With respect to draft article 3, it should be specified that unilateral acts with binding international effect could be formulated not only by a head of State or Government or a minister for foreign affairs but, under certain circumstances, by other officials as well; the draft article should be amended to reflect the strict limitations applicable in such cases.

7. The wording of draft article 4 was preferable to that of previous versions; the current approach granted author States greater flexibility by allowing for subsequent confirmation of an act formulated by an unauthorized person.

8. Draft article 5, paragraph 7, was unnecessary. It was inappropriate to mention only conflict with a decision of the Security Council as grounds for the invalidity of a unilateral act; yet it would be counterproductive to present an exhaustive list of such grounds. The issue could better be dealt with by including the requirement of lawfulness in the definition of unilateral acts. (draft article 1).

9. Lastly, he urged the Committee to consider various issues not discussed in the reports of the Special Rapporteur, including the duration of validity of unilateral acts, the ability to revoke a unilateral act and the validity of conflicting unilateral acts formulated by different authorized representatives of a State.

10. **Mr. Janda** (Czech Republic) said that the draft articles on diplomatic protection raised a number of thought-provoking questions that went beyond the traditional approach to the topic and corresponded to modern developments in international law. In particular, he endorsed the Special Rapporteur's innovative treatment of diplomatic protection as an instrument for the protection of human rights. However, the relationship between the two topics must not be exaggerated; States might take action on behalf of their nationals in situations involving an internationally wrongful act that did not constitute a breach of human rights and, in any case, diplomatic

protection could be exercised on behalf of legal persons.

11. While the principle embodied in draft article 4 had merit, any conclusion must be based on State practice, since it was not always clear whether domestic legislation obliged the State to take action on behalf of its nationals or whether it merely gave nationals abroad the right to consular protection.

12. Although draft article 6 was fully in the spirit of the *Nottebohm* case and of current international jurisprudence, the underlying principle might cause problems of application. It was difficult to imagine a situation in which the dominancy of nationality of the claimant State was so indisputable that even the respondent State would not oppose its exercise of diplomatic protection. The statement that "any doubt about the existence of effective or dominant nationality between the claimant State and the respondent State should be resolved in favour of the respondent State" (A/55/10, para. 474) was hardly satisfactory and, in fact, cast further doubt on the usefulness of the provision. He therefore looked forward to the results of the Commission's further work on the draft article.

13. With respect to draft article 8, he agreed with the Special Rapporteur that the absence of any clause on diplomatic protection in existing conventions on stateless persons and refugees was an oversight which should be remedied.

14. Lastly, he was concerned that the use of the adjective "diplomatic" to modify "protection" presupposed that such protection would always involve the provision of peaceful assistance to injured nationals. He therefore welcomed the Commission's decision not to deal with the use of force in connection with diplomatic protection in its future deliberations on the topic.

15. **Mr. Grasselli** (Slovenia) said that contemporary realities made it essential to consider the relationship between human rights and diplomatic protection, although the latter should be exercised only where international mechanisms were not available. However, traditional diplomatic protection had the advantage of providing an orderly administration of multiple claims, diplomatic channels for negotiation and settlement and State intervention in implementation of the law; individuals were not left to pursue claims on their own behalf.

16. He agreed with the previous Special Rapporteur that States might not resort to the use of force in the exercise of diplomatic protection. Article 51 of the Charter of the United Nations could not be used as a legal basis for armed intervention to protect nationals and, in light of past abuses and of modern erga omnes obligations, the issue could not be dealt with in the context of diplomatic protection, although it might be taken up in some other framework. It would therefore be advisable to insert a saving clause to that effect.

17. Draft article 4 was closely related to the question of whether individuals could pursue their own claims while simultaneously benefiting from diplomatic protection, an issue that required further consideration.

18. He questioned whether the same principles could be applied to natural persons or to legal persons in cases of dual nationality; in his opinion, the provisions of draft articles 5 to 8 should concern only the former. Implementation of the principle that all questions relating to the acquisition of a specific nationality should be governed by the State whose nationality was claimed should not extend beyond the point at which one State's legislation encroached upon the sovereignty of another State. Thus, draft article 6 should be amended to exclude cases where the injured national was a resident of the respondent State.

19. He welcomed the inclusion of refugees under draft article 8. Furthermore, a State should be entitled to exercise diplomatic protection where there was no effective link between the national and the State, provided that the national had no effective link with the respondent State. In principle, States were entitled to protect their nationals and should not be obliged to prove their right to do so except in the specific cases mentioned in draft articles 6 and 8. Similarly, in cases of dual nationality, both States were entitled to exercise diplomatic protection either jointly or separately against third States. In cases where the link to both States of nationality was weak and the person was a legal resident of the respondent State, the bona fide acquisition of nationality should be proved. As for other matters under the topic, he hoped that the Commission would address the protection of corporations and the continuance of nationality in the future.

20. He stressed the distinction between unilateral acts and treaties and welcomed the fact that questionnaires would again be sent to States; the 1969 Vienna

Convention on the Law of Treaties should not be considered decisive on the issue. He agreed that the acts in question were non-dependent and that their legal effects were not predetermined by conventional or customary law. For the time being, international transactions not contained in the law of treaties, such as estoppel, could be excluded from consideration.

21. Non-dependent acts could not be legally effective if there was no reaction on the part of other States; thus, a unilateral declaration on continuity in State succession did not produce legal effect unless it was accepted by other States.

22. It was too early to consider making a distinction between general rules applicable to all unilateral acts and specific rules applicable to individual categories of such acts. It would be best to concentrate first on unilateral acts which created obligations for the author State, although recent events suggested that a focus on acts that corresponded to a State's position on a specific situation or fact would facilitate the collection of information on State practice.

23. Draft articles 2 and 3 should be amended to reflect the fact that national parliaments were also authorized to formulate unilateral acts on behalf of the State. Furthermore, with respect to draft article 5, the Commission should deal with the validity of unilateral acts before considering the issue of their invalidity.

24. He welcomed the draft guidelines on reservations to treaties. In particular, he considered that the establishment of a 12-month time limit for objections to late reservations was well-founded. He also noted that the current version of the draft guidelines did not include mention of State succession, since all matters relating thereto would be dealt with in a separate chapter; he urged that article 20 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties should be taken into consideration in that context. In particular, there was no reason why late reservations should not be permitted within 12 months of a State's notification of succession.

25. In future, he hoped that the Commission would consider the issues of responsibility of international organizations, expulsion of aliens and shared natural resources of States.

26. **Mr. Lavalle Valdés** (Guatemala), speaking on unilateral acts of States, said that, despite an awareness of the difficulties of the topic, he did not share the view that it was not feasible to elaborate general rules applicable to unilateral acts, nor did he feel that the undeniable paucity of information on State practice was an insuperable obstacle. Moreover, he was not convinced that it would be necessary to divide the topic into general rules applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts. The only aspect of unilateral acts that seemed to call for specific rules concerned whether and how they could be revoked.

27. He did not believe that a purely material act could be a unilateral act within the scope of the draft articles and hence found the consistent use of the verb "formulate" to be appropriate. For the sake of clarity, a provision might be added stating that unilateral acts could be formulated orally or in writing. Nor could a unilateral act consist of mere abstention. It followed that silence could not be considered a unilateral act within the scope of the articles, although it might be advisable to discuss it in a future Part Two of the draft articles on the legal effects of acts.

28. To avoid confusion in cases where the formulation of the unilateral act implied but did not refer explicitly to certain legal effects, after the words "producing legal effects" in draft article 1 the phrase "or in a manner that necessarily implies the production of such effects" should be inserted between commas. The word "unequivocal" qualifying "expression of will" in the definition need not be construed as equivalent to "express". An implicit or tacit expression of will could be unequivocal. His delegation agreed with the editorial correction to the definition noted in the last sentence of paragraph 559 of the Commission's report (A/55/10).

29. It would be advisable to add a new article providing that the draft articles did not apply to dependent unilateral acts or, conversely, applied only to autonomous acts. Otherwise, it might be assumed that the draft articles covered unilateral acts that depended on a treaty, such as ratifications or reservations. The article, following the example of article 3 (b) of the Vienna Convention on the Law of Treaties, might provide that nothing prevented the provisions of the draft articles from applying to dependent unilateral acts.

30. Other articles of the Vienna Convention on the Law of Treaties that might, with some care and flexibility, be adapted to form new draft articles on

unilateral acts were articles 4, 27, 31, paragraphs 1, 39, 43, 45, 46, 61, 62, 63, 64, 65 and 69 to 72.

31. With respect to invalidity, it would be helpful to add a new article providing that a unilateral act was invalid or at any rate ineffective against States that were co-parties to a treaty with the State formulating the act, if the act was incompatible with the treaty and the States parties did not accept the act.

32. Referring briefly to a number of points, he said he agreed that the legislature could be the author of a unilateral act within the scope of the draft articles. He also agreed that the term "consent" in draft article 5, paragraph 1, was inappropriate, and he shared the doubts of others about the wisdom of article 5, paragraph 8. Lastly, he felt it might be useful to provide that unilateral acts, or some categories of them, should be registered pursuant to article 102 of the Charter of the United Nations.

33. **Mr. Sepúlveda** (Mexico) said that major changes had been made in the past four years on the draft articles on State responsibility, most of them positive, and the prospect of completing work in 2001 on a topic that had required over 50 years of strenuous efforts was highly encouraging. However, his delegation was seriously concerned about the decision to set aside the question of settlement of disputes. In a matter as important as State responsibility, the text would be incomplete and the efficacy and application of the principle of responsibility would be weakened without a dispute settlement mechanism.

34. The new approach taken to the distinction between the crimes and delicts of a State had helped to resolve the controversy over the former article 19 by referring to the concept of serious breaches of essential obligations to the international community as a whole and moving it to Part Two, which dealt with the consequences of breaches of multilateral obligations and implementation of State responsibility. Most importantly, the new article 49 entitled a State, whether or not it was itself the injured State, to invoke the responsibility of another State if the obligation breached was owed to a group of States including that State or to the international community as a whole.

35. The most controversial issue was the regime of countermeasures contained in the new article 54, whereby a State as identified in article 49 might take countermeasures at the request and on behalf of any State injured by the breach. The same article also provided for countermeasures, and possibly even collective countermeasures, in cases of serious breaches of essential obligations to the international community as a whole.

36. Determining whether such a serious breach had occurred appeared to be, in principle, a matter to be dealt with under Chapter VII of the Charter of the United Nations, and the response to such a breach was already provided for in the Charter. It was not appropriate to alter the principles of the Charter by allowing for collective countermeasures, undertaken unilaterally, without the involvement of the central body of the international community, leaving it up to the individual State to decide whether there had been a serious breach, what sort of countermeasure should be applied and under what circumstances they should be lifted. The latitude fostered by such a system was incompatible with the institutional system that had been created in 1945.

37. Countermeasures had been controversial from the outset. Although the new draft articles set strict conditions for the application of countermeasures, they nevertheless left considerable margin for arbitrary actions, all the more so since they had been divorced from dispute settlement mechanisms. The draft articles should accordingly be limited to establishing the consequences of an internationally wrongful act in terms of reparation and cessation.

38. It was surprising that countermeasures should be placed on a par with other legal categories, such as compliance with jus cogens norms, the exercise of self-defence, force majeure, or action in the face of a severe threat, necessity or consent. Allowing too much room for discretion in the taking of countermeasures could upset the balance required to win general acceptance of the draft articles.

39. He was not convinced of the need to establish different categories of obligations, the breach of which would give rise to State responsibility. The scope and nature of the breach would determine the consequences of the wrongful act under chapters I and II of Part Two, without the need for categorization.

40. The use of the term "international community as a whole" could create confusion and give rise to problems in the interpretation and practical application of the draft articles. It was not clear whether that community was to be understood as comprising States only or other subjects of law. His delegation therefore

supported the suggestion that the term "international community as a whole" should be replaced by the words "community of States as a whole".

41. As a matter of principle, the draft articles governed responsibility between States, a complex enough matter, and at the present stage codification should be limited to that type of responsibility. Hence the draft articles attributed to States alone the power to invoke responsibility, while excluding international organizations, other institutions or individuals from the legal regime they instituted. At a later stage, once that system had demonstrated its efficacy, it might be possible to codify other forms of invocation of State responsibility.

42. With regard to specific articles, he supported the general thrust of articles 16, 17 and 18 on the responsibility of a State in respect of the wrongful act of another State, but felt that it was not necessary that the State which assisted, directed or coerced another State should have done so with knowledge of the circumstances of the act in order to incur responsibility; it should be sufficient that the act in question would be internationally wrongful if committed by that State. Knowledge of the circumstances was in that case implicit, and to create the express condition in the text set up two different but cumulative criteria that would make it harder to attribute responsibility.

43. The title of Part Two, "Content of international responsibility of a State", could be improved. The part dealt with the nature, effects and implementation of the international responsibility of State, matters not well expressed by the term "content". Chapter I of Part Two was a fortunate addition, since it created a bridge to Part One and thereby clarified the basic structure of the draft articles. Article 30 highlighted the crucial elements of cessation and non-repetition.

44. In Part Two, chapter II, the Commission had achieved a good balance between the forms of reparation for an injury caused by an internationally wrongful act, stressing the requirement of full reparation but incorporating sufficient flexibility so that the obligation did not become unduly burdensome. The draft articles took the right approach in making restitution the preferred form of reparation, yet allowing compensation if restitution would involve a burden all out of proportion to the benefit, and making satisfaction a last resort when restitution or compensation were impossible.

45. While noting the comment of the Special Rapporteur that provisions on dispute settlement could wait until the final form of the draft articles had been decided on, he would have preferred a complete set of draft articles including provisions on dispute settlement. The complex system embodied in the draft articles and the many conflicts that might be generated by their practical application necessitated dispute settlement procedures, regardless of the final form the draft articles might take. His delegation would prefer to see them take the form of a convention. Only a binding instrument could offer the guarantees and certainty necessary to enable injured States to obtain reparation. States tended to disparage so-called "soft law". It was doubtful that a declaration would make the significant contribution to the codification of international law warranted by five decades of effort.

46. With regard to diplomatic protection, there was a substantial body of State practice and it would be quite feasible to codify, in a relatively short space of time, the relevant international rules and principles. The topic might well also contain elements of the progressive development of international law, but, if the Commission's work was to meet with success and general acceptance, it should reflect systematic international practice.

47. Diplomatic protection was a procedure whereby a State made a claim on behalf of one of its nationals in response to an internationally wrongful act by another State which had caused injury that could not be redressed by any other lawful means. For the exercise of such protection a number of basic requirements had to be met. First, a State must have violated its international obligations in the commission of the wrongful act. Second, a non-national or his property must have suffered injury which had clearly been caused by that act. Third, there had to have been a denial of justice to the non-national concerned. Fourth, the person concerned should have an effective link of nationality with the protecting State or, in exceptional circumstances, in the absence of nationality the person concerned should have a very close link with the protecting State. Fifth, it was for the State of nationality of the person affected by the wrongful act committed by another State to determine whether, in the given circumstances, diplomatic protection should be extended. In other words, the right belonged not to

the individual but to his State of nationality, to be exercised at its discretion, as State practice showed. Lastly, protection could be extended only to the extent permitted under international law and with the sole objective of obtaining reparation for injury caused to the national. Under no circumstances could diplomatic protection involve the use of force. He noted that the Commission had discussed the use of force, although the provisions of the Charter of the United Nations and international jurisprudence were absolutely clear.

48. He drew attention to three other points arising out of the Special Rapporteur's report. The first concerned the relationship between diplomatic protection and human rights. It was important to note that diplomatic protection was a broad concept, which should not be restricted to human rights issues or indeed be identified with any one issue. To do so would be counterproductive and would fail to take account of the nature of existing human rights standards. Of course, diplomatic protection could be provided in cases involving human rights violations but, as in all other cases, it should respect the basic rules and principles to which he had referred.

49. It was surprising that the Commission had not included a reference to denial of justice and did not intend to do so on the grounds that it pertained to primary rules. That argument, however, violated a basic principle of diplomatic protection: for an injury to be attributable to a State, a denial of justice had to have occurred, in the sense that there could be no further possibility of obtaining reparation or satisfaction from the State to which the act was attributable. The diplomatic protection procedure could be started only once all local remedies had been exhausted. Primary and secondary rules were not set in stone and the distinction between them was not absolutely clear-cut. Exhaustion of local resources and denial of justice were principles that could not be omitted from a draft on such an important issue.

50. Lastly, no consideration seemed to have been given to the principle of the prior renunciation of any claim for diplomatic protection. In both their constitutions and their practice, Latin American countries had cases in which non-nationals undertook activities in the territory of a State under the conditions prevailing in that State's legislation, on the understanding that they would be treated as nationals and would not seek diplomatic protection from their State of nationality in areas relating to the activities concerned. It would be inappropriate for a non-national to call for diplomatic protection in such cases. State responsibility and diplomatic protection remained closely linked as pillars of international law. The Commission should therefore assemble all the pieces of the puzzle, codifying State practice and, where necessary, introducing new rules reflecting the progressive development of international law.

51. **Mr. Fernández Valoni** (Argentina) said that, while it was right to proceed with the codification of secondary rules on diplomatic protection, which simply constituted a special case within the larger framework of State responsibility, the fact remained that such protection was a discretionary right belonging to the State concerned. Diplomatic protection was a useful remedy whereby States could protect their nationals abroad in cases where other, more recently established and theoretically more satisfactory, means were inapplicable. He had in mind the system of international human rights protection or the various mechanisms for investment protection, which were based on well-established principles deriving from the rules of diplomatic protection. A happy medium should therefore be sought between two extreme points of view: the idea that recent developments in international law had made diplomatic protection obsolete, as against the idea that diplomatic protection was a more effective way of protecting the individual. Both might be predicated on the laudable desire to promote the protection of the individual and his rights, but both were extremely simplistic.

52. The advantages and disadvantages of both courses of action — and their widely differing legal, political and moral basis — should be recognized, without overlooking the major differences between their application at regional level. Regional mechanisms were complementary, not mutually exclusive, yet it would be a mistake to overburden them with excessively high expectations. He shared the concern expressed by the representative of Mexico regarding the debate on draft article 2. The prohibition of the threat or use of force as a means of diplomatic protection was crucial, and the failure to include it in the draft articles would be a retrograde step, running counter to the Drago doctrine, which was almost a century old, and the Porter Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, which had culminated in

the rule embodied in Article 2, paragraphs 3 and 4, of the Charter of the United Nations.

53. One point worth considering was the issue of diplomatic protection for legal persons. International practice allowed States to claim for injuries suffered by their businesses abroad — whether or not it was accepted that legal persons possessed a "nationality" — and that position had been accepted in doctrine and jurisprudence. The draft articles therefore could and should deal with the issue, while bearing in mind the necessary differences between legal and natural persons in terms of diplomatic protection. It might clarify the issue if the Commission concentrated for the time being on the protection of natural persons before tackling that of legal persons.

54. With regard to the specific questions posed by the Commission in paragraph 24 of the report, his delegation concurred with the representative of France that the Commission should focus less on the conditions for granting nationality and more on the circumstances which made a link between an individual and a State unopposable by a third State. It was impossible to avoid referring to the concept of an effective or — perhaps more appropriately — genuine link. The concept of a genuine link would, of course, be relative, since its application would depend on the individual circumstances.

55. The Commission's second question was procedural in nature, relating to the burden of proof about an effective link between a national and a State. His delegation believed that there would be no justification in placing the *onus probandi* on the protecting State, which would already need to prove that a link existed for the claim to succeed. To require it to show the effectiveness of the link would be excessive, and it would be better to lay the burden of proof on the requested State.

56. The same applied to the fourth question: if the requested State could show that the person, despite holding the nationality of the protecting State, did not have an effective link with it, diplomatic protection was not appropriate. In other words, if the requesting State proved the existence of a link and the requested State could not show that the link was not opposable to it, the nationality requirement would have been met.

57. Multiple nationality was a completely different issue. As the *Salem* case and the judgement of the International Court of Justice in the *Barcelona Traction* case showed, concurrent claims could be made on behalf of a person with dual nationality, although the lack of an effective link with one of those States could be opposed to the exercise by that State of the right to protection. Protection by a State on behalf of a national with an effective link with it, where that national was also a national of another State with which he had a weaker link, did not have enough support in international practice. For example, in the *Salem* case it had been stated that if two countries considered a person to be their national neither could claim on his behalf against the other. However, the alternatives suggested by the Special Rapporteur should be explored. For example, it might be permissible for a State of nationality to be entitled to claim against another State whose nationality the individual possessed, if the latter State did not belong to a regional or global human rights mechanism. As for the last two questions, concerning the situation relating to stateless persons and refugees, he believed that the proposals *de lege ferenda*, namely, that the questions should be answered in the affirmative, formed a useful starting point.

58. With regard to unilateral acts of States, having spoken on the topic at length at the fifty-fourth session, his delegation would restrict itself to commenting on the points mentioned in paragraph 621 of the report. On the first point, his delegation agreed that if a kind of unilateral act was governed by conventional or special customary law it should be beyond the scope of the draft articles, on the principle *lex specialis derogat legi generali*. Not too much should be made of the distinction, however; some rules in such areas could be relevant. A unilateral act could not exist in a legal vacuum; it derived its validity from its inclusion in the international legal order. With regard to the distinction between general rules that could be applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts, he believed that one of the aims of the Commission's work was to extract general principles from the available material. Further action should be taken on categorizing each kind of unilateral act and reaching conclusions on rules for general application. It would therefore be correct to focus first on promises. The Commission should carry out a detailed study of the copious State practice in that regard. Indeed, a study of promises in particular and unilateral acts in general in the various legal systems could be very helpful in distinguishing the various general legal principles.

59. **Mr. Al-Baharna** (Bahrain) outlined the history of the Commission's consideration of the third report on unilateral acts of States (A/CN.4/505), which contained six revised draft articles on the topic. For lack of time, the Working Group had not been able to consider new draft article 5. A number of points had, however, gained a strong measure of support in the Working Group, which were mentioned in paragraph 621 of the Commission's report (A/55/10).

60. He drew attention to the Special Rapporteur's discussion of three preliminary issues: the relevance of the topic, the relationship between the draft articles and the Vienna Convention on the Law of Treaties and the question of estoppel and unilateral acts, which appeared in paragraphs 9 to 27 of his report. The question of the relevance of the topic had not, however, needed to be raised, since the matter had already been decided in 1997 and 1998, when the Commission had adopted the topic on the grounds that it was supported by State practice.

61. On the second point, the Special Rapporteur, after first stating his view that the Vienna Convention was a useful source of inspiration for the topic, had qualified his remarks by referring to a statement quoted in paragraph 18 of his report, in which the Commission had implicitly cautioned against following the Convention too closely, since there were essential differences between treaty law and the law pertaining to unilateral acts, as defined in his report. Despite the views of some delegations in the Sixth Committee that there was no parallel between treaty law and the law pertaining to unilateral acts, it could be said that, once a unilateral act had been validly formulated and recognized to be enforceable, it would become subject to all or some of the legal consequences attributable to a treaty act, including validity, capacity, nullity, revocation, reservation, good faith and interpretation. He referred the Committee, however, to the replies received from States on the topic of unilateral acts.

62. With regard to the question of estoppel, his delegation concurred with the Special Rapporteur's view that estoppel had no relationship with unilateral acts. There was a striking difference between the action which could give rise to estoppel and the action which could give rise to the formulation of the unilateral act, as the Special Rapporteur had shown in paragraph 27 of his report.

63. In Part One of his report, the Special Rapporteur had dealt with the difficulties involved in formulating a proper legal definition of the expression "unilateral acts of States". He had considered various elements, all of which figured in the existing draft articles, and then attempted to improve the drafting of the articles in the light of discussions in the Sixth Committee and of the written comments by Governments. With regard to the intention of the author State, the Special Rapporteur had concluded that the author's intention to produce legal acts was a crucial point and that therefore all other political acts of States should not be included in the topic. The Special Rapporteur should have the Commission's support on that point.

64. On the use of the term "act", the Special Rapporteur had justified his use of the term rather than the former term "unilateral declaration" on the basis of what he claimed were concerns expressed by delegations in the Sixth Committee, although he had acknowledged that most, if not all, unilateral acts were formulated in declarations, in exceptional taking the form of communiqués or press releases. He had used the term "act" in order to satisfy an important body of opinion which considered the term broader and less restrictive. His arguments were not, however, convincing, since in the new definition of unilateral acts the form in which the act might be used was still lacking. A unilateral act could not exist in a vacuum; it needed a form to embody it. His delegation considered that State practice, precedence and the view of the previous Special Rapporteur, Sir Gerald Fitzmaurice, all confirmed the need to express the unilateral act in a specific form. The new formulation of the definition in draft article 1 did not, therefore, provide a satisfactory solution to the problems it raised.

65. Referring to the comments of the Special Rapporteur on the legal effects of unilateral acts (A/CN.4/505, paras. 48-59), he said that the examples of State practice and precedents that had been cited appeared to have been selected with a view to supporting the arguments of the Special Rapporteur in favour of his preference for the expression "producing legal effects" in the reformulation of article 1 of the topic. However, many of the cases referred to were more relevant to the regime of treaties than to that of unilateral acts.

66. Under the heading "'Autonomy' of unilateral acts" (paras. 60-69), the Special Rapporteur had dealt with the essential issue of the non-dependence of such

acts. In that connection, his delegation supported the inclusion of the expression "autonomous" in the definition of the unilateral act but disagreed with what he considered to be a rather sweeping statement by the Special Rapporteur in paragraph 69 of his report to the effect that although the term "autonomous" was not included in the new definition submitted in his third report, it could be assumed that those acts were independent.

67. He was strongly in favour of retaining the term "unequivocal" in the definition of unilateral acts and agreed with the Special Rapporteur that the term itself should be linked to the expression of will.

68. Regarding the issue of publicity, he agreed that publicity was also an essential element in the definition of unilateral acts and noted that the expression "formulated publicly" contained in the Special Rapporteur's second report had been changed by the Commission to the expression "notified or otherwise made known to the addressee". He could see no justification for altering the earlier formulation and was in favour of its retention, particularly as that formulation had been supported by delegations in the Sixth Committee the previous year.

69. He supported the deletion of the previous draft article 1 on the scope of the draft articles for the reasons stated in paragraphs 81 to 85 of the report, and found the new draft article 2 on the capacity of States to formulate unilateral acts to be entirely acceptable.

70. Referring to the new draft article 3 on persons authorized to formulate unilateral acts on behalf of the State, as proposed by the Special Rapporteur in his report (para. 115), he said that paragraph 1 of that article, which was based, by analogy, on the rules of the Vienna Convention on the Law of Treaties, was undoubtedly acceptable; he was reluctant, however, to accept paragraph 2 since it was too broadly drafted and could give rise to the instability of legal norms. He was inclined to restrict the categories of persons who could formulate unilateral acts on behalf of the State to heads of diplomatic missions and ministers who carried valid powers from their States authorizing them to formulate specific unilateral acts for specific purposes only. That would make a valid distinction between the general authority attributed to the three categories of persons in paragraph 1 (heads of State, heads of Government and ministers for foreign affairs) and a more limited authority attributed to the category of persons in paragraph 2.

71. With reference to article 4, on subsequent confirmation by the State of a unilateral act formulated by a person not authorized for that purpose, he said that the new text was not in line with the restrictive approach he had already outlined. It was doubtful whether a unilateral act formulated by a person not authorized to do so could subsequently be approved by that person's State.

72. On the subject of "silence" and unilateral acts, he agreed with the reasoning of the Special Rapporteur (paras. 126-133) that silence could not be an independent manifestation of will since it was a reaction to a pre-existing act or situation. He considered that silence was related to the principle of estoppel, and was outside the scope of the topic.

73. The new draft article 5 on invalidity of unilateral acts (para. 167) dealt with the question of the invocation by a State of the invalidity of a unilateral act, and closely followed the Vienna Convention on the Law of Treaties. However, in view of the substantive differences between the treaty law regime and the unilateral acts regime, he doubted whether the rules of interpretation applicable to the causes giving rise to the invalidity of treaties under the treaty law regime could be applied, mutatis mutandis, to the same factors or causes listed under that article as a basis for invalidating unilateral acts.

74. **Ms. Di Felice** (Venezuela) welcomed the fact that the International Law Commission had fully taken into account the opinions of Governments, whether expressed in writing or orally in the Sixth Committee. That had given a satisfactory balance to the Commission's work on the subjects being considered by the Committee.

75. The Commission had made considerable progress at its fifty-second session in its discussion of the topic of diplomatic protection even though it had focused its attention on the topic of international responsibility, which had made it impossible to deal adequately with other topics that also deserved careful consideration. While diplomatic protection and human rights were undoubtedly connected, the two issues should be addressed in a balanced manner so as to avoid the tendency to merge diplomatic protection with human rights in general. The Special Rapporteur had submitted draft articles incorporating important

features that would be generally accepted by the Commission, and it was to be hoped that the Drafting Committee, to which some of those articles had been submitted, would be able to consider them the following year and refer them back to the Sixth Committee for its consideration.

76. The definition submitted by the Special Rapporteur in draft article 1 was generally acceptable; however, the second alternative wording of that article, submitted to the Drafting Committee, would be more clear and precise. Her delegation fully agreed that diplomatic protection was a long and complex process in which the State represented a national, or a natural or legal person, in his or her claim against another State. It was important that the drafting should be consistent with the articles relating to international responsibility.

77. She did not consider it necessary to make a specific reference in article 1 to peaceful means of resolving disputes in order to dispel doubts that might be raised by article 2 on the prohibition of the threat or use of force in the context of diplomatic protection.

78. With respect to article 2, submitted by the Special Rapporteur, she considered that the draft should clearly prohibit the use of force in the context of diplomatic protection. It was not only dangerous to introduce the possibility of the use of force in that context but it was also contrary to the trend in international relations and in international law itself. The use of force by a State for the purposes of diplomatic protection of a national should be specifically prohibited. Furthermore, the right of diplomatic protection belonged to the State and not to the individual, a fact that had been clearly established by international case law.

79. The link between a national and the State was a fundamental one, even though that principle might not be applied in the same way in all cases. It was necessary to distinguish between cases where nationality was acquired by birth or by naturalization.

80. It was interesting to note that the draft articles considered the situation of stateless persons and refugees and their right to be protected in certain circumstances. She felt it was acceptable for protection to be extended by a State to a person to whom it had granted the status of stateless person or refugee. The text should specify the conditions under which the State might exercise diplomatic protection in such cases.

81. The reports of the Special Rapporteur had greatly assisted the codification and progressive development of international law relating to unilateral acts of States. Although the topic was a difficult one, progress was possible if States displayed the political will to agree on a text that provided the required certainty in inter-State relations. In spite of the diversity of such unilateral acts, which made it impossible to devise common rules that applied to all, there were certain common aspects relating, in particular, to the validity of international acts, the causes of invalidity and other topics which could be subject of common rules applicable to all such acts. It was essential for the Commission to attempt to draw up a classification of unilateral acts in order to facilitate a more systematic approach to that subject. One complicating factor was the question of State practice, on which further clarification was required from States.

82. The reformulation of article 1 seemed to meet the concerns of some members of the Commission and of some Governments in the Sixth Committee and could therefore serve as a basis for the text as a whole. In conclusion, she said that the Commission should make a thorough study of the invalidity of unilateral acts and consider the inclusion of a provision concerning the conditions for their validity.

83. **Mr. Enayat** (Islamic Republic of Iran) welcomed the Commission's discussion of the draft articles on diplomatic protection and its decision to refer five of them to the Drafting Committee. Draft article 1 raised a number of important issues. In paragraph 1, the statement "diplomatic protection means action taken by a State" could create difficulties, because diplomatic protection was not "action" but the setting in motion of a process whereby the claim of a national was transformed into an international legal procedure. As for the meaning of "injury", if the breach or misapplication of domestic law affected an alien, and no remedy was available from the domestic courts, that could trigger the procedure for reparation of injury under international law. The concept of diplomatic protection should therefore be understood in the same sense as in classical international law, and according to State practice. The spirit of the report was to promote human rights, which he supported, but the right to exercise diplomatic protection belonged to the State of nationality. It should not be confused with the machinery for the protection of human rights. The draft articles should be based on the principle of the

sovereign equality of States and their duty to protect the rights and property of their nationals. The functional protection exercised by international organizations on behalf of their employees was a separate issue and should be discussed in another forum.

84. He would support the deletion of paragraph 2 of draft article 1.

85. In draft article 2, he suggested deleting the whole of the text following the opening statement, "The threat or use of force is prohibited as a means of diplomatic protection". That suggestion was prompted by the history of the use of force supposedly for the purpose of diplomatic protection. The concept of humanitarian intervention should not be allowed to enter the field of diplomatic protection, even under the guise of human rights. It had been invented in the previous century as an instrument of the great Powers, at a time when the prohibition of the use of force was not yet accepted as a principle of international law. On the other hand, his delegation could accept the wording proposed by some members of the Commission for a draft article X: "diplomatic protection is an international peaceful institution which excludes the recourse to or threat of use of force, as well as interference in the internal or external affairs of a State".

86. In draft article 3, he suggested inserting the words "and discretion" in the first sentence after "the right", and deleting the second sentence altogether. He had difficulty in accepting draft article 4, which conflicted with the discretionary exercise of diplomatic protection and with customary law. Draft article 5 should include a mention of the requirement that local remedies should be exhausted. According to paragraph 471 of the report, the real issue was whether a State of nationality lost the right to protect an individual if that individual habitually resided elsewhere. Because it was the discretionary right of the State to exercise diplomatic protection, the individual who had not acquired the nationality of the State of residence was not entitled to benefit from the fact of residence for that purpose, and that held true regardless of the nature of the links maintained with that State.

87. With regard to draft article 6, in his view the rule upheld in customary international law was that diplomatic protection could not be exercised against a State in respect of its own nationals. That was also the rule enshrined in article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws. The 1967 European Convention on Consular Functions provided in article 46 (1) for the protection of stateless persons except where they were former nationals of a respondent State. He did not agree with the statement in paragraph 472 of the Commission's report that the most recent sources supported the rule proposed in draft article 6. Nor did he agree with the Commission that the decisions of the Iran-United States Claims Tribunal were recent sources for the evolution of the rules applying to diplomatic protection. In cases of dual nationality, most of the Tribunal's decisions rested on treaty interpretation rather than diplomatic protection, and it drew a clear distinction between the two. In Case No. 18 it had stated that the applicability of article 4 of the 1930 Hague Convention to the claims of dual nationals was debatable because, under its own terms, it applied only to diplomatic protection by a State. As the Special Rapporteur explained in paragraph 154 of his report, there were few records of current State practice concerning diplomatic protection of dual nationals against another State of which they were also nationals. The 1997 European Convention on Nationality did not take sides on the issue.

88. Draft article 7 reflected the rule enshrined in article 5 of the 1930 Hague Convention and subsequent jurisprudence, namely that the State of an individual's dominant nationality could exercise diplomatic protection on his or her behalf. However, it did not go beyond what was already said in draft article 5. With regard to the joint exercise of diplomatic protection by two or more States of nationality, he pointed out that the respondent State could seek implementation of the dominant nationality principle and deny one of the claimant States the right to diplomatic protection.

89. Concerning draft article 8, he believed the issue of refugees and stateless persons had not been recognized in customary international law. Paragraph 16 of the Schedule to the 1951 Convention Relating to the Status of Refugees provided that the issue of travel documents under the Convention did not confer on the diplomatic or consular authorities of the country of issue the right of protection. That meant that even if the domestic legislation of a refugee's State of residence recognized the right of diplomatic protection for itself, the legislation would not be opposable to other Parties. The administrative assistance mentioned by the Special Rapporteur in paragraph 178 of his report was

irrelevant to the issue of diplomatic protection. Article 2 of the International Covenant on Civil and Political Rights did not impose on States parties any duty to exercise their right of diplomatic protection. Moreover, as the Special Rapporteur stated in paragraph 183 of his report, the right would rarely be exercised in respect of refugees and stateless persons. He therefore felt that draft article 8 should be deleted.

90. **Mr. Hussein** (Iraq), said that the definition of the scope of diplomatic protection in paragraph 419 of the Commission's report and in article 1 of the draft articles seemed to leave the decision as to the measures to be taken by a State against another State in respect of an injury to one of its nationals to the discretion of the State. Legally, however, the correct position was that, when a State had exhausted local remedies, it should resort to the international courts to determine the issue of State responsibility. His delegation agreed with the numerous other delegations that had expressed the view that the use of armed force for the purposes of diplomatic protection was contrary to the principles of international law, in particular Article 51 of the Charter of the United Nations which prohibited the use of force except in self-defence.

91. His delegation's analysis of draft article 2 was that it was contrary to the Charter in that it permitted the use of force under certain conditions, in particular where a State claimed to be protecting one of its nationals. That provision seemed to be an attempt to incorporate politically motivated ideas which had no connection to international law and which could lead to the predominance of force over the law.

92. He agreed with those delegations that had emphasized the importance of strengthening the principle of human rights, a direction in which the international community had made great strides. However, the claim that the use of force was legitimate in order to defend the principles of human rights was at variance with those principles and amounted to an attempt to use such considerations for the attainment of specific political objectives. The enlargement of the concept of diplomatic protection to include the question of human rights would deprive the concept of diplomatic protection of its legal nature.

93. Turning to the topic of reservations to treaties, he said that it made a positive contribution by enabling a number of treaties of a universal nature to be ratified. In that connection, the recent trend in favour of restricting the use of reservations, or of not including provisions in international treaties permitting States to make reservations, might restrict the universality of treaties and might encourage States to make more interpretative declarations, leading to confusion as to the legal force of such declarations. Careful preparatory work was essential in order to draft comprehensive treaties to which all States could consent. During the preparatory negotiations it was necessary to take into account the interests of all States and to bring their viewpoints closer together, particularly in the case of conventions relating to human rights.

94. There were numerous legal difficulties to regarding unilateral acts as a source of international law, and it was not permissible for States to impose their own unilateral legal enactments on other States. The adoption by the General Assembly of the draft resolution contained in document A/55/L.9/Rev.1 would place on record the concern of the international community regarding the imposition of coercive economic measures adopted by certain States as a means of exerting political pressure on other States, a practice that had no basis in international law.

95. One form of unilateral act was a flagrant violation of international law, namely the imposition by two permanent members of the Security Council of unilateral action against Iraq by imposing air exclusion zones in the northern and southern regions of the country and carrying out constant aerial bombardments on political pretexts that had no legal justification. The new draft article 5 on the invalidity of unilateral acts submitted by the Special Rapporteur was applicable to such acts, which also constituted an ongoing aggression against his country.

96. **Ms. Telalian** (Greece) said she agreed with the Commission's view that diplomatic protection was an institution of continuing value and could be seen as an instrument for the protection of human rights. However, it was only designed to protect a State's own nationals, and its exercise depended on the free will of the State concerned. Future work on the topic should focus on practical suggestions to render the institution more acceptable to States as a mechanism for the peaceful solution of disputes concerning the treatment of aliens.

97. Draft article 1 defined diplomatic protection in traditional terms, as a discretionary right of the State of

nationality. That did not conflict with the interest of the individual. However, the term "action" in the context of diplomatic protection could include resort to the threat or use of force, and she opposed that approach. The exercise of diplomatic protection should be confined to peaceful methods, and be governed by the rules of general international law and of the Charter of the United Nations. She therefore welcomed the Commission's decision to delete draft article 2. There should be no ambiguity in draft article 1 concerning the prohibition of the use of force. Paragraph 1 of draft article 1 should reflect the fundamentals of the principle of diplomatic protection which were widely accepted by States and already formed part of customary international law. The use of the term "omission" might cause confusion. Otherwise, she agreed with the approach that diplomatic protection could be triggered only in respect of an internationally wrongful act which had caused injury to the national of a particular State. The customary law requirement of the exhaustion of local remedies, confirmed by the International Court of Justice in the *Interhandel* case, should be included in the draft articles.

98. Customary international law also called for a link of nationality with the claimant State, a requirement which raised difficulty in the event of dual or multiple nationality if the respondent State was the State of the second nationality. The result of applying the rule in article 4 of the 1930 Hague Convention could be to deprive an individual of diplomatic protection altogether. However, since that time the principle of effective or dominant nationality had emerged, as found in Case No. 18 of the Iran-United States Claims Tribunal and in the *Mergé* case decided by the Italian-United States Conciliation Commission. On that basis, draft article 6 incorporated the principle of effective and dominant nationality and set aside the principle of non-responsibility, an approach with which she fully agreed. She also agreed with the content of draft article 7, which was likewise based on the principle of effective and dominant nationality and on recent case law, as well as on article 5 of the 1930 Hague Convention, a provision which had been unanimously accepted. However, it might be inadvisable to retain draft article 5. The conditions for acquiring nationality had little to do with the establishment of the nationality link for the purpose of diplomatic protection. Some guiding principles on the element of good faith required when granting nationality could be derived from the *Nottebohm* case. Paragraph 2 of draft article 1 departed from the requirement of the nationality link, as found in customary international law and State practice in the field of diplomatic protection. The provision in that paragraph would not necessarily benefit stateless persons or refugees.

99. Turning to the topic of unilateral acts of States, she agreed with the suggestion that the scope of the topic should be limited by focusing on acts of States which produced legal effects. In draft article 1 the Commission was proposing an interesting definition of unilateral acts, but the intention of the author State should not be the only criterion for determining the binding effect of a unilateral act; the expectations created by it should also come into play. The other issues raised by the Special Rapporteur called for careful examination in future sessions of the Commission. Paragraph 621 of the Commission's report contained useful suggestions for its future work on the topic.

The meeting rose at 1.08 p.m.